

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 UNITED STATES, :

4 Petitioner :

5 v. : No. 02-1794

6 MANUEL FLORES-MONTANO :

7 - - - - -X

8 Washington, D. C.

9 Wednesday, February 25, 2004

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at 10:14 a.m.

12 APPEARANCES:

13 LISA S. BLATT, ESQ., Assistant Solicitor General, Department
14 of Justice, Washington, D. C. ; on behalf of the
15 Petitioner.

16 STEVEN F. HUBACHEK, ESQ., San Diego, California; on behalf
17 of the Respondent.

18

19

20

21

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	LISA S. BLATT	
4	On behalf of the Petitioner	3
5	STEVEN F. HUBACHEK	
6	On behalf of the Respondent	28
7	REBUTTAL ARGUMENT OF	
8	LISA S. BLATT	
9	On behalf of the Petitioner	53
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:14 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument now in
4 02-1794, the United States v. Manuel Flores-Montano.

5 Ms. Blatt.

6 ORAL ARGUMENT OF LISA S. BLATT

7 ON BEHALF OF THE PETITIONER

8 MS. BLATT: Thank you, Mr. Chief Justice, and may it
9 please the Court:

10 Customs officials have the responsibility to protect
11 the Nation's borders against the entry of dangerous or
12 unwanted items. Consistent with that fundamental and
13 sovereign necessity, customs officials have historically had
14 the power to open containers and conduct a thorough search
15 of items without a warrant, probable cause, or any
16 particularized suspicion.

17 QUESTION: Well, now in this case, I suppose the
18 Government did have reasonable suspicion.

19 MS. BLATT: That's correct, but we did not rely on it
20 and the evidence was suppressed on -- based on the Ninth
21 Circuit's rule that a gas tank cannot be removed and opened
22 without reasonable suspicion.

23 QUESTION: Can you make us, i.e., I'm not saying this
24 pejoratively, but can this Court be required to decide what
25 might be a hypothetical question, it seems to me, the dog

1 barked and therefore they had grounds for thinking their
2 were drugs in the gas tank, and he kicked the gas tank and
3 it was hollow, and no one disputes those facts. But you
4 want to decide -- us to decide this case, as does the other
5 side, as if those facts didn't exist. It sounds to me like
6 a hypothetical question, almost in the direction of an
7 advisory opinion. What would we have decided if those facts
8 didn't exist? But they do. So how does that work?

9 MS. BLATT: Well, I don't think it's an advisory
10 opinion in that the evidence has been suppressed. But,
11 Justice Breyer, let me directly answer your question on why
12 the case is here. In 2002, the Ninth Circuit held that the
13 Constitution is violated if customs officials remove and
14 open a gas tank without reasonable suspicion, and in that
15 case there was reasonable suspicion, making the case very
16 difficult to challenge.

17 The Government legitimately wanted to challenge the
18 case in a -- in a -- in a case where the officers actions
19 could not be subject to a potential Bivens liability for
20 violating the clearly established law of the Ninth Circuit.
21 At the same time, customs officials viewed the Ninth
22 Circuit's decision as posing an immediate and present danger
23 to their ability to protect the border, and they thought it
24 imperative to try to challenge a -- bring up a case that
25 challenged that rule as soon as possible.

1 So two weeks after the Ninth Circuit's decision was
2 decided, respondent drove across -- drove across the border
3 with a gas tank full of 80 pounds of marijuana, and the
4 Government, we think legitimately, told the district court,
5 and there was no secret at any time in this case, including
6 at the petition stage, that we were not going to put on
7 evidence that there was reasonable suspicion, even though
8 the dog alerting and the solid-sounding tap of the gas tank,
9 we could have established or presumably could have
10 established that that was reasonable suspicion.

11 And both the district court and the Ninth Circuit
12 summarily affirmed the -- suppressed it and then affirmed
13 the suppression, because there was not reasonable suspicion,
14 and that's why this case is here. The customs officials see
15 this case as a threat to their ability to deter and detect
16 smuggling at a container that is relatively large and that
17 is commonly used -- in fact, it is the most common container
18 used along the Mexican border --

19 QUESTION: Can we go back to your --

20 MS. BLATT: -- to conceal contraband.

21 QUESTION: You gave a Bivens justification for what is
22 extraordinary. I mean, it's not a violation of article 3
23 for us to decide it on your basis, but still, this Court
24 deals with concrete cases with actual facts and not with
25 abstract questions. So is it -- is it your notion -- is it

1 correct that what the Ninth Circuit says becomes clearly
2 established law so that an officer would genuinely be -- be
3 subject to Bivens liability when this Court hasn't addressed
4 the question?

5 MS. BLATT: No, but we didn't want to have to tell the
6 men and women who were in charge of enforcing the border
7 that they should be subject to a potential suit, at least
8 being named in their personal capacity in a lawsuit. It
9 seemed more appropriate from our perspective to try to bring
10 a case as soon as possible where we think we could have
11 proven reasonable suspicion, but it squarely fit within the
12 Ninth Circuit's rule that reasonable suspicion was required.

13 QUESTION: I suppose you could also say it's a question
14 of resources. The Government does not want to have to put
15 on witnesses, get officers up from the border, have them sit
16 in court, go through the motion to suppress, so that you
17 have a very real interest simply in expediting trial
18 procedures by taking the course you did. I don't know if
19 that helps you on this article 3 problem or --

20 MS. BLATT: It -- it helps to explain why we thought
21 there was a paramount interest in getting the case as soon
22 as possible. We didn't want to divert resources away from
23 the border into having to prove our reasonable suspicion.
24 In fact, there's already been serious fallout in terms of
25 trying to prove reasonable suspicion when we search gas

1 tanks, because the Ninth Circuit has said that all of our
2 discovery on how we train our dogs has to be produced, and
3 this is extremely sensitive information.

4 QUESTION: This is a -- I wasn't doubting the
5 Government's motive here. I think you have excellent
6 motive, though maybe Bivens, maybe it was a little
7 overconcerned about the Bivens, maybe it wasn't. But what
8 I'm interested in is the law. That is, this isn't the first
9 case where this has happened, not necessarily involving the
10 Government, and I'm not sure how the law's supposed to work.

11 Parties come in and they say, we would like you to
12 decide this issue. I'm sure they would. But in order to
13 get to that issue, we have to assume out of the case certain
14 facts that everyone agrees are there.

15 MS. BLATT: Well, that --

16 QUESTION: Have you ever looked this up? Are there any
17 -- have you come across this kind of a problem?

18 MS. BLATT: I think it's -- it's clearly an -- as
19 Justice Ginsburg said, it's not an article 3 problem. Let
20 me say, Justice Breyer, there's no finding that there was
21 reasonable suspicion, nor do we put on any evidence that
22 would have permitted that.

23 QUESTION: No, all there is, is there happens to be, I
24 think, in the record, undisputed facts that the dog barked
25 and that they kicked the gas tank and it was hollow.

1 QUESTION: Well, I -- wait a minute --

2 QUESTION: Anyway --

3 QUESTION: I think the kick of the gas tank or the

4 tapping showed it was full, not hollow.

5 QUESTION: Full, whatever, whatever, whatever --

6 QUESTION: Am I right?

7 MS. BLATT: Yes, it was --

8 QUESTION: Showed -- showed whatever it wasn't supposed

9 to show.

10 QUESTION: Exactly. And I think the dog doesn't bark,

11 he just alerts. Is that right?

12 QUESTION: All right.

13 MS. BLATT: That's right. But let me just say as a --

14 QUESTION: I know we have an agreement on that.

15 MS. BLATT: -- as a prudential matter --

16 QUESTION: Are we sure that there was reasonable

17 suspicion?

18 MS. BLATT: No, there's no --

19 QUESTION: Or is it just possible that there was --

20 that there reasonable suspicion?

21 MS. BLATT: There's no finding, Justice Scalia. It is

22 our position that we could have put on proof that this

23 constituted reasonable suspicion by putting the dog's

24 handler on and the agent explaining what a -- what a solid-

25 sounding tap means. We didn't do that, so there's no

1 finding, but let me just say --

2 QUESTION: But the Ninth Circuit would require evidence
3 of the training of the particular dog and so forth?

4 MS. BLATT: Well, at least that the defense is titled
5 to discovery on that so that the -- the handler. But let me
6 just say, Justice Breyer, as a prudential matter, I think
7 that that is a legitimate concern at the petition stage when
8 we petitioned, and there was no secret that we intentionally
9 brought this case for the purpose of having it reviewed.
10 But the case has been briefed, there's no question about
11 standing, and we think it's appropriate to reach the issue.
12 Twenty-five percent of all drug seizures along the Mexican
13 border are hidden in gas tanks, that we've not only found
14 marijuana, cocaine, heroin, currency, methamphetamine, there
15 have weapons and ammunition --

16 QUESTION: Does it matter how -- how much you have to
17 take apart of a car to make a search? Does that enter into
18 the ultimate resolution in the Government's view or do we
19 look at how easy it is to remove a gas tank and look at it?
20 Does that matter?

21 MS. BLATT: Well, it might matter, but it certainly
22 doesn't matter where the -- the compartment or container in
23 question is designed to be removed and put back together by
24 mechanics. A gas tank removal is something that can be done
25 within a reasonable time and that --

1 QUESTION: How much time does it take?

2 MS. BLATT: Well, in this case, once the --

3 QUESTION: To take it off and put it back?

4 MS. BLATT: Well, in this case it took under a half an

5 hour, but, Justice O'Connor, I want to stress that in other

6 cases, depending on the type of car, it might take an hour

7 or two hours, and the last thing we want is our customs

8 official to be on a Fourth Amendment stopwatch and telling

9 the mechanic to rush. So they need --

10 QUESTION: On the 25 percent figure, you say 25 percent

11 of all seizures from vehicles? Does that include 25 percent

12 of seizures where you search the person or?

13 MS. BLATT: No, it's 20 --

14 QUESTION: What's -- the 25 percent is a percentage of

15 what?

16 MS. BLATT: Twenty-five percent of narcotics seizures

17 in terms of amount of seizures along land borders. That

18 doesn't include seaports --

19 QUESTION: Oh, 25 percent in terms of quantity?

20 MS. BLATT: In terms of number of seizures. It doesn't

21 necessarily mean how much volume, but it's a lot, given that

22 the gas tank is one of the largest containers.

23 QUESTION: But included in that base is seizures from

24 the person where somebody has it in their pocket and so

25 forth?

1 MS. BLATT: Yes, that's correct, but --

2 QUESTION: Well, the gas tank here had 80 pounds in it,
3 didn't it?

4 MS. BLATT: Eighty pounds of marijuana with five
5 gallons of gas, and that's an enormous amount, and this
6 could have been another -- another -- other dangerous items,
7 it doesn't have to be just marijuana. And they have seen it
8 all. At the same time, someone does not store personal
9 effects in their gas tank. It's just a repository for fuel.
10 And this involved far less of an intrusion on privacy
11 interest than the type of searches that can happen and do
12 happen at the border, such as the traveler's baggage and the
13 passenger compartments in the vehicle.

14 QUESTION: May I ask of you if the Government has
15 procedures in place for the cases in which inadvertently
16 they damage the car or -- or maybe the thing might blow up
17 on some occasion or something like that? What -- what's
18 remedy does the citizen or the maybe an alien or the citizen
19 have in that situation?

20 MS. BLATT: Any time there's damage to any types of
21 property at the border, the person is handed a claims form,
22 which is processed through customs, first under the Federal
23 Tort Claims Act. Now, there's an exemption for claims
24 arising out of the tension of properties by customs under 28
25 U. S. C. 2680(c), but assuming that happens, customs can pay,

1 and does pay, up to \$1,000 under the Small Claims Act, under
2 31 U.S.C. 3723. And Justice Stevens, there's another
3 statute, a customs-specific statute, 19 U.S.C. 1630, that
4 would permit customs to pay up to \$50,000, but the
5 restriction is for -- it has to be for non-commercial
6 properties, so that would be personal property that customs
7 damage. So there's --

8 QUESTION: I would think there are a lot of cases,
9 repair bills are getting pretty expensive now, where \$1,000
10 wouldn't cover it, the damage to a car.

11 MS. BLATT: Well, that may be, Your Honor, but this
12 doesn't involve claim of damage and --

13 QUESTION: No, I just -- but it's -- it's sort of in
14 the background as we're asking whether it's reasonable in
15 the -- in the -- in an ultimate sense, and I just -- that's
16 one of the things that I'm concerned about is --

17 MS. BLATT: Well, sure, a gas tank is about \$100, \$200
18 item, and it's conceivable that any search can result in
19 damage. Now, respondent has never claimed --

20 QUESTION: You mean to repair it or to replace it?

21 MS. BLATT: Well, you're right. You could have -- you
22 could have --

23 QUESTION: When you say \$100, to reconnect it, it's
24 about \$100?

25 MS. BLATT: That's right. You would -- no, the item

1 itself probably costs under \$200, but you would have labor
2 costs.

3 QUESTION: Well, that's not true. I recently had to
4 get one, and it's expensive, I can tell you.

5 (Laughter.)

6 MS. BLATT: Well, depending on the car, the ones I've
7 seen have been under \$200, but you would have associated
8 labor costs and maybe other parts. But the basic point is
9 that this is a container, it's a paradigmatic type of item
10 that can be opened by the -- at the border without any
11 particularized suspicion. And --

12 QUESTION: Ms. -- Ms. Blatt, may I just go back before
13 you go on with your argument to follow up on Justice
14 Stevens' question? You spoke of the \$50,000 limit as being
15 for damage or, I guess, destruction of non-commercial
16 property. Does -- does the non-commercial mean, as I would
17 assume it would mean, that a truck or lorry that is driven
18 as a -- as a carrier would not be covered, damage to that
19 would not be covered by the \$50,000 coverage?

20 MS. BLATT: That's right. And property is --

21 QUESTION: So if the -- if the -- if the truck, I mean,
22 if the commercial truck catches fire as a result because
23 there's a spark in the gas tank and everything goes up in
24 flames, in effect there's no redress?

25 MS. BLATT: Well, I don't know too many commercial

1 importers that don't have insurance that would cover damage
2 by customs, but the important thing is --

3 QUESTION: No, but the customs isn't going to pay for
4 it.

5 MS. BLATT: Customs is not going to pay for that.

6 QUESTION: But this would happen in a --

7 MS. BLATT: But --

8 QUESTION: -- reasonable search too, wouldn't it?

9 MS. BLATT: Excuse me?

10 QUESTION: I'm -- this would happen in a search where
11 there is probable cause as well, it could happen, couldn't
12 it? When there's -- when there's reasonable suspicion, the
13 same thing could happen, couldn't it? And you also wouldn't
14 have to pay for the truck?

15 MS. BLATT: Well, that -- that's absolutely true, but -
16 -

17 QUESTION: Right, and you would also --

18 QUESTION: And that would -- and that would not render
19 what was otherwise a reasonable search unreasonable, would
20 it?

21 MS. BLATT: It would depend. As long -- assuming
22 they're acting reasonably in carrying out the search, it's
23 still reasonable and --

24 QUESTION: The mere fact that there's no compensation
25 for actual damage, accidental damage to -- to the truck

1 would not render the reasonable search unreasonable if there
2 were suspicion, right?

3 MS. BLATT: That's correct.

4 QUESTION: And the reason --

5 QUESTION: So why should it do it here?

6 MS. BLATT: There have been thousands of disassemblies
7 at the border --

8 QUESTION: But isn't -- isn't the point that in -- in
9 the -- in the hypothetical that Justice Scalia puts, with
10 the probable cause, we start with the assumption that the
11 offices are in there acting reasonably. The question in
12 this case is posed by Justice Stevens' question. Would the
13 potential for damage -- is it reasonable to go in there in
14 the first place without probable cause? So that is a
15 different issue, isn't it?

16 MS. BLATT: Well, no, I think it's reasonable to search
17 property at the border by virtue of the fact it's at the
18 border, and given the Government's overriding interest and
19 the person's reduced expectations. But Justice Souter,
20 there has been no known or reported instance of this
21 hypothetical risk materializing at the border with respect
22 to a customs search.

23 QUESTION: Ms. Blatt, you mentioned, you started to
24 give a number, 1,000 searches, fuel tank searches, and then
25 you gave a number earlier about how many gas tanks turned

1 out to have contraband or something. Do you know what
2 percentage of those gas tanks were -- was there disassembly
3 and what percentage were done by a less intrusive means by
4 the dog and the tapping on the fuel tank?

5 MS. BLATT: Well, all gas tank seizures, which there
6 have been thousands, have to be done by removal and
7 disassembly of the tank. There are, you could call them
8 searches, because that's what they are, of gas tanks that
9 don't involve removal and disassembly, if you use
10 sophisticated equipment such as density busters and X-rays.
11 But all these seizures that are occurring at the border, in
12 order to get to the drugs, you have to unscrew the bolts
13 that are holding the tank to the undercarriage of the
14 vehicle and remove the tank and open it up. .

15 QUESTION: Is the practice then to just go straight to
16 that procedure and skip the dog and the tapping, or do they
17 go through the whole thing?

18 MS. BLATT: Well, they have dogs at all the major ports
19 of entry, but the dogs don't always alert, so I wouldn't say
20 it's necessarily skipping, but the dog may not alert. They
21 also at some of the facilities have what are known as fiber
22 optic scopes, which are extremely sophisticated and
23 effective equipment. Unfortunately, 75 percent or higher of
24 all tanks have, in the filler tube, have an anti-siphoning
25 valve that blocks the entry of the scope into the tank, but

1 they will try that if they have it. It's not always
2 available. It's an extremely expensive piece of equipment.
3 It costs \$160,000 per unit. But if they have that,
4 presumably they try that first, and if it's blocked, then
5 they put the car up on a lift and unscrew the metal bolts
6 that are holding them that -- to the metal straps that are
7 holding the tank and they'll remove the tank. And then from
8 there on it's pretty straightforward on how to open up the
9 tank.

10 QUESTION: But if we -- if you prevail in this case and
11 they don't have to do that, they can just say it's good
12 enough to go right to the disassembly and we don't have to
13 bother with dogs and maintaining dogs and anything else?

14 MS. BLATT: Yeah, that's right. Our position is where
15 the procedure imposes only a modest intrusion on interests
16 protected by the Fourth Amendment, the officers don't have
17 to exhaust every least intrusive method.

18 QUESTION: Obviously that would be the result if we
19 were to support the Government's view here, and I think
20 we're interested in knowing how often people's gas tanks
21 would be disassembled if the Government's view prevails
22 here. How many times percentage-wise would people crossing
23 a land border expect to have their gas tank removed if the
24 Government prevails here?

25 MS. BLATT: It's -- it's --

1 QUESTION: I mean, let's say 1,000 cars cross the
2 border point in an hour. What percentage of those will have
3 their gas tanks removed?

4 MS. BLATT: Not very many, Justice O'Connor. Let me
5 give you these statistics. There have been 120 million
6 vehicles that passed through this country's borders last
7 year, and over the last four years, four years, there have
8 been 8,000 gas tank disassemblies.

9 QUESTION: Yeah, but you didn't have this rule
10 established that you didn't need reasonable suspicion. What
11 we're asking you to speculate on is if the Government
12 prevails and we say, fine, you can take the gas tank off,
13 you don't have to have any degree of reasonable suspicion.
14 Then how many will there be?

15 MS. BLATT: Exactly the same. It has always been the
16 rule up until the Ninth Circuit that we could take apart a
17 gas tank without reasonable suspicion. Customs officials -
18 -

19 QUESTION: Have any of the other circuits followed the
20 Ninth Circuit's -- other circuits have that -- which have
21 land borders?

22 MS. BLATT: No, no, they've always been able to take
23 apart a gas tank on something less than reasonable
24 suspicion. But Justice O'Connor, it is true that as a
25 practical matter customs does not take the time or energy to

1 take -- to call the mechanic, pay for the mechanic to take
2 apart the gas tank unless their suspicions are focused on
3 the gas tank, and it will usually be because of the dog
4 alerts, or the more common situation is it -- that they're
5 just not sure whether that gas tank has been altered. Maybe
6 a bolt looks different from another bolt or it looks like
7 it's been unscrewed, and it may be the person had their gas
8 tank worked on, but they're just not sure, they have some
9 concern about the person's travel plan story and so they --
10 they want to go ahead and make sure the gas tank's not
11 containing contraband.

12 QUESTION: Suppose -- suppose you prevail. Are there
13 any regulations or -- or procedures under which you'll keep
14 statistics and data, so that say over -- suppose you
15 prevail, then over the next five years we can -- we can look
16 back and see that there have been 10,000 searches and
17 contraband has been discovered only 5 percent of the time or
18 something?

19 MS. BLATT: Yes, they keep statistics on seizures on
20 narcotics and what are known as positive and negative
21 seizures. And in the last four years of the 8,000 gas tank
22 seizures that have happened, 85 to 90 percent of those have
23 been what are known as positive hits or there's been a
24 presence of contraband, and so 10 to 15 percent of those
25 have been so-called negative searches where the tank is

1 reassembled and the motorist sent on their way, and I -- we
2 would expect that those statistics to continue, that they
3 have limited resources and they conduct a search when they
4 think it's appropriate and necessary.

5 QUESTION: But you don't know of the 8,000 what percent
6 were without any suspicion?

7 MS. BLATT: No, but there's never been any kind of
8 requirement. I -- I think we can --

9 QUESTION: All right. So --

10 MS. BLATT: -- confidently say their suspicions were
11 focused on the gas tank, whether or not that that would have
12 convinced a court that it was reasonable under --

13 QUESTION: Yeah, I see.

14 MS. BLATT: -- this Court's definition I think is
15 unclear.

16 QUESTION: Are there any rules or administrative
17 procedures in the customs that would say -- that would apply
18 in respect to suspicionless searches of gas tanks? For
19 example, random searches, do it once a month or here's -- we
20 have a random program or we check up to see how it's going
21 or -- are there -- are -- is it just each customs agent for
22 himself when -- if you win, is it each customs agent for
23 himself with no check whatsoever?

24 MS. BLATT: No, well --

25 QUESTION: Or are there internal administrative checks

1 that would be a kind of substitute for a judicial check?

2 MS. BLATT: There are extensive training of customs
3 officials --

4 QUESTION: But what does it say --

5 MS. BLATT: -- about how to go about searching a car,
6 where to look, where -- where smugglers typically hide their
7 drugs, and what type of evidence they may leave behind, and
8 that's what the agent is looking for. The agents are also
9 trained though, Justice Breyer, to rely on their experience
10 and intuition and hunches, and over time border officials
11 gather extensive experience about what they're looking for.

12 QUESTION: When --

13 MS. BLATT: They also can consult with a supervisor if
14 they have a question about whether a search should actually
15 be done.

16 QUESTION: So, for example, you have a customs agent
17 whose experience leads him to believe that parents with
18 small children are more likely to be smuggling heroin. Now,
19 this would be an odd customs agent. Is there anything in
20 the system that would discover that this is the person who's
21 doing all the suspicionless checks and something's gone
22 wrong here, so there's -- do you see what I'm looking for?

23 MS. BLATT: Well, his --

24 QUESTION: I'm looking for some way of --

25 MS. BLATT: -- supervisor would be aware of the search,

1 but with a 85 to 90 percent success rate, that possibility
2 seems rather remote.

3 QUESTION: But then you have the suspicion searches in
4 that 85 percent. I'm trying to figure out if we have each
5 customs agent for himself to conduct whatever suspicionless
6 searches he wants, and you have a few of the, perhaps in
7 every organization there are a few unusual ones who cause
8 some problems, are there any internal checks within the
9 system, because you're going to not have a judicial check?
10 I wonder if there are any administrative ways.

11 MS. BLATT: There may be checks where people can file
12 complaints, I don't know. But the same officer could be
13 instructing that the spare tire compartment be taken apart
14 or that a tire be taken out or that every scrap of luggage
15 can be taken off or that the person could empty their
16 wallets, their shoes, their purses, their clothing, and put
17 the person to a considerable inconvenience.

18 But a gas tank is not a container, Your Honor, that
19 there's some sort of heightened expectation of privacy. It
20 stores fuel.

21 QUESTION: So assume that if there's any de facto
22 check, there's more likely a check on the gas tank than
23 there is on emptying your wallet and taking your shoes off
24 and everything else, namely the expense that it causes to
25 the customs service in time -- in terms of the time of its

1 agents, and I suppose you have to pay these mechanics that
2 come and do it.

3 MS. BLATT: Yeah, it's about -- cost runs about a cost
4 of \$90 to \$140 per visit, but Justice Scalia, there are
5 also, very consistent with your point, hundreds of cars in a
6 lane that this inspector has to get through, and they always
7 are concerned about moving through the legitimate traffic
8 and legitimate trade. They want to get people in, they want
9 to get people past the border. At the same time, they're
10 extremely concerned about what's in -- what people might be
11 concealing in their vehicles, and a vehicle is an extremely
12 large container and a gas tank is a relatively large
13 container, and given that it is 25 percent of all drug
14 seizures have been hidden in the gas tank, they have an
15 essential interest in being able to not only detect it when
16 they think it might be there, but also deter it.

17 It has been customs' experience over many, many years
18 that smugglers are looking to exploit any weakness along our
19 border security efforts, and they will readily place their
20 drugs where they're least likely to be detected.

21 QUESTION: Does that mean, for example, that you could
22 rip out all the upholstery because you can hide drugs inside
23 the upholstery?

24 MS. BLATT: Well, ripping out the upholstery would
25 first present a question of what kind of intrusion there is

1 on -- under the Fourth Amendment or an interest protected on
2 the Fourth Amendment, and there may be a significant
3 deprivation of a property interest. Now, we would probably
4 contend that we could rip what upholstery was reasonably
5 necessary to conduct the search.

6 QUESTION: I thought -- I thought you would, and maybe
7 I'm recalling your brief incorrectly, but I thought you --
8 you made a distinction between the kind of intrusive bodily
9 search like a strip search and said that's the only one
10 where you would need reasonable suspicion. All others, all
11 that involve only property and not the person, the rule
12 should be at the border, anything goes, no reasonable
13 suspicion required. Is that the position the Government is
14 taking?

15 MS. BLATT: There's a small nuanced caveat to that. We
16 think we can search property without suspicion and use
17 whatever force is reasonably necessary. At the same time,
18 Justice Ginsburg, the Constitution still applies with
19 respect to the property and the search has to be carried out
20 in a reasonable manner, and if someone took a giant axe and
21 starting whacking away at leather upholstery, that would
22 very well constitute an unreasonable search.

23 But this case doesn't involve a claim of damage and
24 respondent has never said that he was deprived of a
25 significant possessory interest in his gas tank. Rather,

1 what happened, it was taken apart and it could have been
2 easily put back together.

3 QUESTION: But your -- your answer to my question about
4 property is, as long as you're not wantonly destructive, you
5 can -- any -- anything that's in the car as distinguished
6 from a person?

7 MS. BLATT: That's our -- that would be our position,
8 but I'm saying it also involves a very distinct factor, and
9 that is that there's a deprivation of a significant property
10 interest if the item is going to be obliterated or its value
11 going to be destroyed, and that's not the contention made in
12 this case or the type of deprivation of a privacy -- of
13 property interests you would have with a gas tank. But
14 sure, if you took a vase and smashed it when you could have
15 looked in it, or let me just say if you wanted to open up
16 the trunk --

17 QUESTION: Well, but not just on the -- the -- if you
18 smash it unnecessarily, but suppose the only way to get
19 behind the fabric in say a seat cushion or something like
20 that is to cut it open. It -- does your policy apply to
21 that situation too?

22 MS. BLATT: Well --

23 QUESTION: Because I don't suppose you have a
24 seamstress who sews up the seat right away.

25 MS. BLATT: Right. Well, we would look at first what

1 the type of deprivation is, and if it's a teeny little tear
2 that can be easily repaired, maybe there's not a significant
3 deprivation.

4 QUESTION: But suppose it's something that cannot be
5 repaired.

6 MS. BLATT: Let's --

7 QUESTION: You have to cut up a seat -- a seat cushion.
8 What -- what do you do?

9 MS. BLATT: Let's suppose that there's a significant
10 deprivation. It would at least be reasonable for the court
11 to look at what kinds of alternatives were available to the
12 Government. As a practical matter, Justice Stevens, we --
13 customs officials have long, skinny metal probes which are
14 like needles that they use to search upholstery, so if it's
15 fabric you wouldn't even see it going in and out. If it's
16 leather, you probably are going to get a tiny hole. Now,
17 whether that would constitute a significant deprivation --

18 QUESTION: I see.

19 MS. BLATT: -- might turn on the facts and
20 circumstances, but these are wonderful pieces of equipment
21 that customs officials use all the time to look inside
22 places that are hard to see, and they use them exactly on
23 seats.

24 But to be sure, Justice Stevens, customs gets
25 complaints about upholstery. They let a dog into a car and

1 the dog scratches the upholstery or the agent's going in
2 there and searching and he steps on something.

3 These kinds of things happen at the border and customs
4 have to -- have a job to do and they've got to use whatever
5 force is reasonably necessary. But I think these cases are
6 separate because they involve some arguably significant
7 deprivation of the owner's possessory interest in that piece
8 of property. If it's a leather seat and it's torn, the
9 value's gone down.

10 But the Ninth Circuit applies a rule that doesn't let
11 customs officials open up a container even where they can
12 put it back without damaging the tank, and so we think that
13 case is quite distinct.

14 Mr. Chief Justice, I'd like to reserve the balance of
15 my time.

16 QUESTION: Very well, Ms. Blatt.

17 Mr. Hubachek. Am I pronouncing your name correctly?

18 MR. HUBACHEK: Yes, Mr. Chief Justice.

19 ORAL ARGUMENT OF STEVEN F. HUBACHEK

20 ON BEHALF OF THE RESPONDENT

21 MR. HUBACHEK: Mr. Chief Justice, and may it please the
22 Court:

23 The Court's decision in *Montoya* established that for a
24 search other than the routine border search, reasonable
25 suspicion was required.

1 QUESTION: Well, Mr. -- Mr. Hubachek, Montoya discussed
2 that in the context of a search of the person. It -- it
3 said we reserve judgment on whether a strip search of his
4 body --- it was talking about people, not gas tanks.

5 MR. HUBACHEK: Absolutely, Mr. Chief Justice, but four
6 courts of appeals have unanimously applied the analysis in
7 Montoya to searches of property or effects under the Fourth
8 Amendment. The Ninth Circuit's decision in Molina-Tarazon
9 is consistent with those cases in that it applied the
10 Montoya paradigm to the search of the gas tank and the
11 seizure of the gas tank.

12 QUESTION: Well, would you say that a ship coming in at
13 a port in our country from elsewhere cannot be searched
14 thoroughly without reasonable suspicion?

15 MR. HUBACHEK: A ship could be searched thoroughly
16 without reasonable suspicion. I -- but --

17 QUESTION: But a land vehicle coming from, for example,
18 Mexico at the land border crossing cannot be?

19 MR. HUBACHEK: Well, I -- the distinction that I would
20 draw would be the point --

21 QUESTION: What is the difference?

22 MR. HUBACHEK: -- of disassembly. I don't think that
23 you can disassemble conveyances that come to the border.

24 QUESTION: You think that if the ship came in that the
25 gas tank could be removed and examined for presence of

1 illegal goods?

2 MR. HUBACHEK: I -- I don't think that it would be
3 reasonable to disassemble a ship either, particularly in
4 light of all of the various methods that are available. I
5 don't think it's supported historically either. You know,
6 the initial statutes that the Solicitor General cited in the
7 brief don't support any sort of disassembly of conveyances,
8 the -- particularly the 1790 statute. What it talks about
9 is allowing customs officials on board to look around, to
10 mark items, to take records and so on and so forth, and then
11 when items are being passed through customs, then the
12 customs officer --

13 QUESTION: But in today's world, the figures, the
14 statistics are staggering about how many narcotics are
15 brought into our country by way of the use of gas tanks. I
16 mean, that's an incredibly large figure.

17 MR. HUBACHEK: And I certainly would --

18 QUESTION: And -- and what are we supposed to do about
19 that?

20 MR. HUBACHEK: Well, Justice O'Connor, I think that
21 what we're supposed to do about it is to use the methods
22 that are tried and true by the customs service itself. If
23 the customs service itself wants to move away from
24 dismantling-type searches into searches that involve the use
25 of the -- their technology --

1 QUESTION: Well, they have to dismantle to get into a
2 gas tank where it -- the opening will not permit the entry
3 of a -- the little looking device.

4 MR. HUBACHEK: Well, sometimes -- maybe in the brief I
5 was too excited by all this technology that's available, but
6 I think that sometimes it's important to start back at the
7 initial things. Molina-Tarazon, for instance, the case that
8 developed this rule, found reasonable suspicion based upon
9 mud splatterings on the bottom of the tank. Carreon, the
10 Tenth Circuit decision, found reasonable suspicion in large
11 part based upon the fact that certain bolts were shiny.
12 So --

13 QUESTION: Mr. Hubachek, now you say, you give the
14 impression that all courts of appeals have agreed with the
15 Ninth Circuit. Ms. Blatt gave the impression, at least to
16 me, that the Ninth Circuit was alone on this. What is the
17 state of decisions, say in the Fifth Circuit, which has so
18 much land border like the Ninth Circuit?

19 MR. HUBACHEK: Mr. Chief Justice, no court but the
20 Ninth Circuit has addressed this specific issue here, the
21 dismantling of gas tanks. The Fifth Circuit, though, has
22 held --

23 QUESTION: Is it not done along the Texas border?

24 MR. HUBACHEK: I'm sure it is done, but there just
25 hasn't been a case that has arisen.

1 QUESTION: But there hasn't been a reported case where
2 it was challenged?

3 MR. HUBACHEK: That's correct. But however, the Fifth
4 Circuit has decided that intrusive searches of property are
5 subject to the Montoya analysis and that reasonable
6 suspicion is required in a drilling case called Rivas. And
7 in that case, you know, they used a drill to drill into the
8 vehicle.

9 QUESTION: Is -- is it the -- you -- you described the
10 search as intrusive, but as I understand it, your objection
11 is not to the intrusion, your objection is to the
12 disassembly.

13 MR. HUBACHEK: Yeah, yes, that's correct.

14 QUESTION: So -- so the -- the -- I -- I assume your
15 objection rests on either or both of these grounds, either
16 the value of the property, which is either lessened or
17 placed at risk, or the inconvenience to the driver and
18 passenger while the -- while the intrusion or the
19 disassembly goes on. Which is it?

20 MR. HUBACHEK: I would say it's both of those and I
21 think that the -- of course, the Court's Soldal decision
22 establishes that a meaningful interference, even if there's
23 no privacy interest at all, still implicates the Fourth
24 Amendment. But certainly there are issues with respect to
25 value. If my gas tank has been dis --

1 QUESTION: All right, you know, what is the issue on
2 value? They'll put it back together again, there's
3 apparently no record that -- that these blow up all the
4 time.

5 MR. HUBACHEK: Well --

6 QUESTION: So -- so what is the -- the property
7 concern?

8 MR. HUBACHEK: Well, I think that there a number of
9 concerns. Number one, do -- if I resell the car, do I have
10 to disclose that the gas -- the fuel system was
11 disassembled? I mean, what if I have a warranty? Does that
12 exclude things from a repair by the warranty because it's
13 been worked on by someone who's not authorized by Ford or
14 whatever company owns the car? Are there issues with
15 emissions? You know, this is a 1987 vehicle that we're
16 talking about and the systems are much more complicated now.
17 I just read yesterday a regulation indicating if you have a
18 .04 gap, you have to have a sensor that can determine if you
19 have that much leakage, .04 inches, that you have to have a
20 sensor that determines that kind of leakage. Would it
21 violate the terms of your lease to have some unauthorized
22 person or some person you don't know about to go ahead and
23 disassemble --

24 QUESTION: Your -- your clients weren't worried about
25 all that apparently. I mean, I don't think 60 pounds of

1 cocaine was good for the gas tank either, was it?

2 (Laughter.)

3 MR. HUBACHEK: No, I'm sure that it's not, and
4 certainly you'd have to --

5 QUESTION: Is that -- is that the only kind of -- I
6 mean, I take it you concede there's no privacy interest
7 here?

8 MR. HUBACHEK: Well, I --

9 QUESTION: And -- is that right?

10 MR. HUBACHEK: It -- it certainly is -- is not a
11 tremendous privacy interest.

12 QUESTION: Well, is there any?

13 QUESTION: Well, all right. So there's no privacy
14 interest and all there is is an interest that you don't want
15 the Government hurting your property, which is conceivable
16 in an interest. But on the other hand, they say no privacy
17 interest, conceivable the Government will hurt your
18 property. Every day of the week we deal with government
19 people might hurt our property. And on the other side, 25
20 percent of all the drugs that come into the United States
21 outside -- by land, come in in gas tanks, so this is an
22 overwhelming interest for letting you do it. After all,
23 they search your suitcases, they search my pockets, they
24 search every piece of luggage, they -- they search anything
25 you're bringing in, and it's not an unusual thing at a

1 border.

2 So -- so, how -- how do you respond to this strong
3 interest on their side and no privacy interest and very
4 little property damage risk on the other side?

5 MR. HUBACHEK: Well, I don't agree that there's very
6 little property damage risk based on the -- the other things
7 that I've just mentioned. Plus there's also the issue of
8 the security of the individual, which was focused on in
9 Molina-Tarazon, you know, what confidence do you have that
10 this crucial system in your vehicle is going to be reliable
11 when it's been taken apart --

12 QUESTION: Well, presumably the person filling the gas
13 tank with drugs had to disassemble the tank to put the drugs
14 in there, so apparently willing to take that risk --

15 MR. HUBACHEK: But --

16 QUESTION: -- but not willing to let the customs
17 service do the same thing?

18 MR. HUBACHEK: Right. Well, people who smuggle drugs
19 in gas tanks are willing to take a lot of risks, but the
20 average traveler who comes to the border and is faced with
21 the possibility of random disassembly of their gas tank is
22 not going to be willing to take those risks.

23 QUESTION: Well, how -- how often does that happen that
24 an innocent person has his gas tank person random --
25 randomly disassembled?

1 MR. HUBACHEK: Well, there's -- one of the weaknesses
2 of this record is -- is that although the customs service
3 claims that it's important for them to be able to do random
4 disassemblies, they haven't established any sort of program
5 under which they do random disassemblies, but there were
6 several hundred gas tank disassemblies in which there were
7 no drugs found.

8 QUESTION: Well, we were told that 15 percent or 20
9 percent of the time nothing is found, 80 or 85 percent
10 something is. That -- that's my understanding of the
11 Government's submission.

12 MR. HUBACHEK: Right. And I think that that supports
13 the notion that when they act upon suspicion and their
14 experiences, we've heard detail this morning that they can
15 be effective. That doesn't mean though that it's essential
16 to have the ability randomly to disassemble based upon those
17 suspicions.

18 QUESTION: They're not talking about randomly. They're
19 -- they're talking about -- I -- I think -- I think Ms.
20 Blatt said hunches. I mean, there, you know, there -- there
21 are just some intuitions that agents get that may not rise
22 to the level of what a court may acknowledge is an
23 articulable suspicion, and they shouldn't -- they shouldn't
24 have to worry about whether they have to prove that or not.
25 I -- do you really think they're going to do it when -- when

1 there's no reason whatever to do it?

2 MR. HUBACHEK: Well, that -- that's the problem with
3 absolute discretion. Any -- any officer across the United
4 States can make the rules for that particular day. But I
5 think that it's important to bear in mind that these hunches
6 have, you know, there are many --

7 QUESTION: But we're talking about border searches with
8 customs officials who are trained and they have limited
9 budgets. Why do they want to pay the cost of having a
10 mechanic disassemble an engine unless they have a good
11 reason for doing it? I mean, it's inconceivable to me that
12 they try to run up the number just to run up the number.
13 It's too expensive. They don't have that kind of money.

14 MR. HUBACHEK: Well, I think that any seizures that the
15 Court has required there actually be founded suspicion are
16 troublesome for the officers. I mean, if they pull people
17 over randomly, that's time that's taken away from other
18 activities that they could be undertaking, so there's always
19 a natural disinclination to do that. But that doesn't
20 change the fact that this Court has repeatedly in --

21 QUESTION: But -- but not as easily observed and not as
22 easily recorded by supervisors. I mean, it seems to me if
23 you have an agent who repeatedly has a -- cars backing up at
24 the -- at the gate that -- that he's controlling, and who
25 repeatedly comes up empty on -- on gas tank searches, that

1 fellow's not going to be there very long. I mean, it, it's
2 easy to observe somebody who's abusing the system, it seems
3 to me.

4 MR. HUBACHEK: Well, again, I think that it's important
5 though that officers not be able to act arbitrarily across
6 the United States. It's not -- it's not necessarily going
7 to be limited to one officer so that we'll always be able to
8 weed them out.

9 QUESTION: In -- in your answer to Justice Souter's
10 question a few minutes ago, you said that not only was the
11 property interest important, but the inconvenience was a --
12 was a factor, and I don't know that we've ever said much
13 about that that would -- would support it. Certainly
14 there's going to be some inconvenience any time you cross a
15 border, and this thing, if it takes half an hour, is that
16 really a Fourth Amendment factor?

17 MR. HUBACHEK: Well, I -- I think it's a factor, but I
18 don't think it's as important as the other factors we've
19 talked about, the potential diminution in value, the lack of
20 security upon the -- the individual who's driving away in a
21 vehicle that's been altered by unknown individuals, and the
22 fact that, you know, that --

23 QUESTION: When you -- when you -- once you -- you --
24 the -- the trunk is fair game, any luggage is fair game,
25 fancy Gucci shoes might be fair game, it seems to me that

1 the fuel tank, if we're looking at it from the point of view
2 of the -- the -- how much damage there might be or the cost,
3 is -- is a lesser thing than personal items, and also that
4 the privacy interest is much stronger in what we already say
5 can be done without suspicion.

6 MR. HUBACHEK: I -- I agree that the suspicion -- that
7 the privacy interest in the gas tank is not as high as the
8 other items that you've mentioned. However, it still is
9 true that when you put your Gucci shoes on, you're planning
10 to take them off, so if an officer takes them off to look at
11 them, that's not a problem. If they open up your luggage,
12 your luggage is expected to be opened, and in fact, 1461
13 requires that you furnish an opportunity to open up that
14 luggage. But no one expects that their gas tank when they
15 buy a new car to a tremendous expense that they put their
16 family in, no one expects that that part of their vehicle is
17 going to be open like they know that their luggage is.

18 QUESTION: One other question is whether it is
19 unreasonable to -- to require them to expect it if they're
20 running their car back and forth across the border? I mean
21 --

22 MR. HUBACHEK: Well, I -- don't think that it's --

23 QUESTION: What -- why is it wrong? What -- what test
24 do you -- do you urge as to -- as to when -- when a search
25 by border agents cannot be done? What -- what is the

1 criteria?

2 MR. HUBACHEK: I think when it involves disassembly of
3 property and --

4 QUESTION: Anything that involves disassembly. So --
5 so what about taking the cap off of a -- off of a bottle
6 that's there. Is that -- is that disassembly?

7 MR. HUBACHEK: Well, I think the cap off the bottle is
8 similar to the luggage. You would just open up the cap and
9 that -- that's what's expected to happen, but no one --

10 QUESTION: What if the bottle's sealed? I mean, you
11 know, it's -- it's -- it's a sealed bottle?

12 MR. HUBACHEK: I -- I guess --

13 QUESTION: You have to break the seal.

14 MR. HUBACHEK: That could result, I mean, that may be
15 necessary --

16 QUESTION: That can't be done?

17 MR. HUBACHEK: That may -- it may be situations where
18 that shouldn't be done without --

19 QUESTION: Suppose it's the same as a -- suppose
20 there's a terrorism problem and --

21 QUESTION: Wow.

22 QUESTION: -- they say that we want to search every
23 fifteenth truck that comes in, there might be anthrax or
24 bombs or whatever and we want to give the agents the power
25 to look thoroughly into these big trucks even without

1 suspicion. Now were you saying the Fourth Amendment would
2 stop that?

3 MR. HUBACHEK: If we're talking about a specific
4 threat, where there is, you know, a specific --

5 QUESTION: No, no, non-specific threat, it's the
6 present situation. The Government simply says, we're
7 worried about our borders, they're not secure, and we want
8 to look at the trucks, that we want the -- the customs
9 agents to be able to look at trucks that are coming in.
10 They may have dangerous items on -- in -- on board, and we
11 want them to look whenever they want. It's at the border,
12 just like your purse, just like your valise, just like your
13 bag. Now, what -- what's your view of -- is your case the
14 same, different, or what do you think of that case?

15 MR. HUBACHEK: I -- I think -- I don't think that --
16 that suspicionless searches under those circumstances would
17 be reasonable because there's not been any showing that
18 random searches or disassemblies of gas tanks would be at
19 all effective. In *Delaware v. Prouse*, this Court
20 disapproved the process of pulling over people randomly to
21 check registrations, both because it was not demonstrated to
22 be effective, but also because it was not demonstrated to
23 have any sort of deterrent effect.

24 QUESTION: All right, so in your view, suspicionless
25 searches of trucks, whether for bombs, anthrax, weapons, or

1 drugs all stand or fall together?

2 MR. HUBACHEK: Well, I think that -- I think that there
3 -- at least with the every 15 cars, there would be more of a
4 deterrent because then they would know that every fifteenth
5 car is being searched, but there is no program in place now,
6 there was nothing offered below, in fact, there was no
7 evidence offered below --

8 QUESTION: That's a different question. My question
9 was, do they stand or fall together?

10 MR. HUBACHEK: Right. I -- I think that the -- that
11 our case is stronger than your hypothetical.

12 QUESTION: Delaware against Prouse had nothing to do
13 with the border. I mean, that was on a highway -- inland
14 highway in Delaware. The Fourth Amendment has always been
15 much relaxed at the border.

16 MR. HUBACHEK: No, I -- I agree with that, Mr. Chief
17 Justice, but my point from Delaware v. Prouse is that in --
18 in examining a random program, the Court looked to two
19 things. It looked to whether or not it was demonstrated to
20 be effective. It's not demonstrated to be effective here.
21 And it also looked to whether or not there was going to be a
22 deterrent effect from it, and there was no --

23 QUESTION: But -- but you just can't transplant a case
24 involving a car on a highway inland to the border.

25 MR. HUBACHEK: No, I understand. My point is -- is

1 that the empirical evidence was important in the Delaware v.
2 Prouse case, and that's how this Court distinguished it in
3 Sitz, which is a case that the Solicitor General cited in
4 support of the notion that the Court shouldn't look to other
5 alternatives.

6 QUESTION: What -- what do you do about United States
7 v. Ross when -- when you're urging your -- your -- your
8 disassembly point?

9 MR. HUBACHEK: Well --

10 QUESTION: Now that -- that was a case involving a
11 border search statute, not -- not the one at issue here, to
12 be sure, but nonetheless what we said, to quote it, is
13 certainly Congress intended custom officers to open shipping
14 containers when necessary and not merely to examine the
15 exterior of cartons or boxes in which smuggled goods might
16 be concealed. During virtually the entire history of our
17 country, whether contraband was transported in a horse-
18 drawn carriage, a 1921 roadster, or a modern automobile, it
19 was been assumed that a lawful search of a vehicle would
20 include search of any container that might include the
21 object of the -- of the search.

22 MR. HUBACHEK: Well, I -- I think that --

23 QUESTION: Now, why isn't that applicable here?

24 MR. HUBACHEK: I think that it -- actually, it's
25 consistent with our position, because the statutes that Ross

1 was talking about were the statutes from 1789 and 1790 that
2 I was referring to earlier, and what they allowed was the
3 customs officers to go on board the ships to mark things and
4 to make their records and so on and so forth, and then the
5 packages would then be opened by the customs officer, and
6 the first Congress thought this was a very significant act,
7 because not only did they require the customs officer to
8 open up the packages, but they had to have two reputable
9 witnesses, merchants outside the customs service, to observe
10 those. So that was a very significant event.

11 But nothing in those statutes allowed disassembly of
12 vessels. It, in fact, it did authorize --

13 QUESTION: Well, now, your -- your -- your position
14 is -- is -- is any container, you're not just talking about
15 gas tank, you say nothing can be disassembled. So if I have
16 some gizmo that is assembled and is not meant to be opened
17 again, you say if I bring that across the border the customs
18 agent can't look into it.

19 MR. HUBACHEK: Well, they can look into it with all of
20 the -- the various abilities that they have. If they have -
21 -

22 QUESTION: They can't open it.

23 MR. HUBACHEK: If they have reasonable --

24 QUESTION: They can't -- they can't open it.

25 MR. HUBACHEK: If they have reasonable suspicion, they

1 can.

2 QUESTION: No, but without reasonable suspicion. I'm -
3 -

4 MR. HUBACHEK: No, I don't think they can open up the
5 gizmo without reasonable suspicion, but they still have all
6 of the abilities they have to bring to bear on that, all the
7 -- the experience, all of their technology, all of their
8 ability to examine things.

9 QUESTION: I think I -- I -- I lost what you were
10 saying when you started referring to the gizmo. If -- if I
11 bring in -- if I buy a valuable statue in Europe and I have
12 it elaborately crated so it won't be hurt in transport, when
13 it gets to New York, can they open the crate to see what's
14 inside?

15 MR. HUBACHEK: Yes, they can, and that would be
16 consistent with the 1790 statute, which said that you could
17 open up the packages.

18 QUESTION: All right. So the difference between the
19 crate and the gas tank is, I take it, your concern that
20 after they've put the gas tank back together, there may be
21 some risk that it won't function or that the emissions
22 system will be affected? I mean, is that where you draw the
23 line between the crate and the tank?

24 MR. HUBACHEK: Well, I think that the -- the line that
25 I'm drawing is -- is the line that was drawn by the first

1 Congress when they said that you can open up packages and
2 they didn't provide any additional authority on board the
3 vessels --

4 QUESTION: Well --

5 MR. HUBACHEK: -- to disassemble --

6 QUESTION: Yeah, but you're -- you're arguing a
7 constitutional restriction here. Your -- your argument is
8 not that Congress has not provided the authority. Your
9 argument is Congress can't provide the authority. So what,
10 it seems to me what Justice Souter is asking is, if Congress
11 can provide the authority to uncrate the statue, what
12 constitutional prohibition is there to uncrating the gas
13 tank?

14 MR. HUBACHEK: Well, of course, in their brief, the
15 Solicitor Generals argued that that statute is -- does go
16 along with the constitutional protection, so I think that
17 the fact that the same Congress that passed the Fourth
18 Amendment had this narrow view of what you can open,
19 packages with the two witnesses there. And they were also
20 obligated if there was --

21 QUESTION: No, but, I mean, we -- we didn't have this
22 problem in 1790 or 1799, and the question is, what is the
23 difference in principle for constitutional purposes between
24 opening up, disassembling my crate, and disassembling the
25 gas tank? And the only thing that I can think of is, based

1 on what you've said so far, is the concern that maybe the
2 gas tank won't work or I'll have to disclose it to a
3 subsequent purchaser, or the emissions system will be hurt.
4 Do you have anything else to distinguish in principle
5 between the -- the uncrating and the opening of the tank?

6 MR. HUBACHEK: Well -- well, yes. There's also the
7 notion of the -- that was relied upon in Molina-Tarazon, the
8 security of the individual who's in the vehicle, and there's
9 also the --

10 QUESTION: Well, the security is -- is the -- is the
11 concern that maybe the tank won't work or -- or are you
12 saying maybe -- maybe the -- it'll blow up? Is that what
13 you mean by the security?

14 MR. HUBACHEK: Right, yeah.

15 QUESTION: Okay. Well, the individual, I assume, is
16 not in the car when they take the tank out, so we're talking
17 simply about property damage. When they uncrate the statue,
18 they might knock the hand off, but they can still uncrate
19 the statue. What -- anything else in principle between the
20 two situations?

21 MR. HUBACHEK: Well, I think that crates are intended
22 to be open. If, you know, you packed it carefully and
23 ultimately you intend to unpack it, so you intend to pack
24 the -- the crate. I don't think it's reasonable though to
25 disassemble a valuable piece of property that has safety

1 implications --

2 QUESTION: So it depends on my intention?

3 MR. HUBACHEK: Well, I think what --

4 QUESTION: I intend the crate to be opened, but when I
5 buy a gas tank I don't intend it to be opened?

6 MR. HUBACHEK: Right. I think that that's -- that's -
7 - if there's --

8 QUESTION: But that's not the expectation of privacy
9 test.

10 MR. HUBACHEK: No, I think it's -- it's the property -
11 -

12 QUESTION: So this is a new test, I take it?

13 MR. HUBACHEK: No. Soldal establishes that even if
14 there is no invasion of privacy, there is still a Fourth
15 Amendment intrusion if there's a seizure of property. This
16 is a meaningful interference with the -- your enjoyment of
17 the possession of your property.

18 QUESTION: No, but the distinction between the two
19 cases, I take it, now is the intent of the owner of the
20 property that is disassembled. In the one case, the owner
21 ultimately intends the crate to be opened up. In the other
22 case, he does not intend the gas tank to be opened up. Is,
23 is that it?

24 MR. HUBACHEK: Well, I don't think it's a subjective
25 test. I think it would be -- we're talking about

1 reasonableness under the Fourth Amendment and --

2 QUESTION: Well, if that -- it can't be that he doesn't
3 -- well, expected to be opened up. If it's -- if it's a
4 container where things can be carried, one of the things
5 that the Government said in its brief is that if luggage is
6 free and then this will become the container of choice, and
7 we know that in a very high percentage there have found
8 drugs there. So it is a container, we know it's been used
9 as a container. Why should it not be treated like any other
10 container?

11 MR. HUBACHEK: Well, I think it's different from any
12 other container because it's part of a vehicle that was
13 never expected or intended by its designers to be taken
14 apart in this manner. But I would also say that there's
15 been 15 years of history in which, you know, courts of
16 appeals have applied *Montoya* to searches of property. If
17 smugglers were changing their patterns in response to those
18 decisions, this -- the Tenth Circuit rendered its decision
19 15 years ago, the Fifth Circuit rendered its decision 5
20 years ago. The Government offered no evidence below that
21 there have been changes in smuggling patterns based upon
22 those courts' decisions applying a reasonable suspicion
23 standard.

24 QUESTION: Yeah, but those -- those cases it didn't
25 involve gas tanks, if I understand correctly.

1 MR. HUBACHEK: That's -- that's correct. They didn't
2 involve gas tanks, but they involved vehicles, and basically
3 the theory was is that if smugglers --

4 QUESTION: May I -- may I ask you a hypothetical?
5 Supposing Congress passed a statute specifically authorizing
6 gas tank searches and providing in the statute that after
7 the search shall be conducted, the -- there will be two
8 people on hand, one, Mr. Goodwrench, and one Mr. Value
9 Appraiser, and they would have to give a good certificate,
10 both of them have to give a certificate that the value of
11 the car has not been impaired by what has been happened, and
12 if it has, the amount of value will be reimbursed
13 immediately by the Government to the owner. Would that be a
14 constitutional statute?

15 MR. HUBACHEK: Well, I think that, you know, since
16 ultimately we're talking about reasonableness, that would
17 address some of the objections that I've made today, but I
18 still think --

19 QUESTION: Would it -- would it cure enough of them to
20 be constitutional is the question?

21 MR. HUBACHEK: I don't -- I don't think that it would,
22 because I still think that that's beyond what the First
23 Congress envisioned and that's a -- our best guide to what
24 the Fourth Amendment was intended to mean. They didn't
25 authorize the disassembly of the ships that were coming into

1 port. They didn't say that, you know, if you took two ship
2 builders on board. What they said was, you can take apart
3 the packages, things that are intended to be opened, but you
4 have to have two witnesses, and if it turns out that there's
5 nothing in there, you have to -- the customs officer would
6 have to pay --

7 QUESTION: My hypo gave you your two witnesses.

8 MR. HUBACHEK: I -- I understand, Your Honor.

9 QUESTION: If 85 percent of the people with the gas
10 tanks that were searched have the contraband, what you're
11 asking us to do is to protect the expectation of the other
12 15 percent. I -- I suppose that's the rule, but it -- when
13 the percentages get these high, it -- it seems to me to put
14 the exclusionary rule somewhat into question with reference
15 to the border. Suppose it was 95 percent. Do we still have
16 to protect the 5 percent of the people? I mean, I guess
17 that's the law.

18 MR. HUBACHEK: Well, Justice Kennedy, there's no
19 showing that adopting the rule that we're asking for would
20 have any effect on the effect -- effectiveness of the border
21 searches. There's no evidence offered below that, you know,
22 the -- if you deprive them of the ability to random searches
23 that there will be even one more person who would get
24 through. So I think that if they --

25 QUESTION: Well, that works the other way around as

1 well.

2 MR. HUBACHEK: Well, that's true, but it would still
3 vest the absolute discretion across the border for any
4 customs inspector for no reason at all to disassemble
5 valuable property. That's inconsistent with the history of
6 the Fourth Amendment, it's inconsistent with the Nation's
7 earliest statutes, it's even inconsistent with section 1461,
8 which applies directly to entries from contiguous countries,
9 and that --

10 QUESTION: Well, for -- for no reason at all they can -
11 - they can conduct searches of -- of the person, right,
12 without any suspicion? That's okay.

13 MR. HUBACHEK: That's correct.

14 QUESTION: The Gucci shoes and everything else. But
15 somehow when you -- when you reach this -- this magical,
16 what, disassembly of a vehicle, that that has some special
17 constitutional status. I -- I find that quite implausible.

18 MR. HUBACHEK: Well, Justice Scalia, I think that the
19 importance is, is that it is very -- we're asking for a
20 standard that's -- comports with what was adopted in 1789
21 and 1790, and the 1461 statute that's currently applicable
22 talks about allowing the customs inspectors to look inside
23 the vehicle by providing a key, not by providing a lift or
24 providing tools, but by providing a key. That's what's
25 reasonable, that's what's routine, that's what's should be

1 protected by the Fourth Amendment.

2 QUESTION: Do you -- do you question the -- the
3 Government gave an example, I think from fiscal year 2003.
4 They said 300 fuel tanks were disassembled and put back
5 along the southern border without incident, that is, no
6 explosion and no malfunction in the vehicles for the
7 travels.

8 MR. HUBACHEK: I don't have any additional information
9 about those. I mean, I don't know if that violated those
10 individuals' leases, whether they felt a lack of security as
11 was discussed in the Molina-Tarazon case, whether their
12 warranties were any way affected, they simply don't have any
13 information.

14 QUESTION: But it would be a graver concern than a
15 warranty if the vehicle might blow up after. And -- but
16 there doesn't seem to be any evidence of that, that there's
17 a high risk that that would occur.

18 MR. HUBACHEK: Well, there's no risk -- apparently
19 there's no evidence of anything blowing up, but that doesn't
20 mean that individuals' security was implicated as they drove
21 away from the border knowing that their valuable property
22 had been altered by unknown government functionaries.

23 If the Court has no further questions, I'll submit.

24 QUESTION: Thank you, Mr. Hubachek. Ms. Blatt, you
25 have three minutes remaining.

1 REBUTTAL ARGUMENT OF LISA S. BLATT

2 ON BEHALF OF THE PETITIONER

3 MS. BLATT: Thank you, Mr. Chief Justice. Justice
4 Kennedy, you asked about the 25 percent figure, and in the
5 appendix to the petition at 12a, that 25 percent figure
6 relates to vehicle drug seizures, so what customs meant by
7 seizures was from the vehicle. That wouldn't include stuff
8 found in someone's pockets.

9 Justice Breyer, you asked about how we track searches.
10 There's apparently a nationwide computer tracking system
11 where customs tracks all of their searches, both positive
12 and negative, and when there's a positive report search,
13 it's called a seizure. When there's a negative, it's called
14 an incident report, and the agent is in fact required to
15 document what his reasons were -- were for conducting the
16 search, and the supervisor must read that, and if there was
17 a problem developing about improper use of his resources at
18 the border, the agent would be either trained or
19 disciplined.

20 QUESTION: Are those public documents?

21 MS. BLATT: I would doubt it. I don't know, Justice
22 Kennedy, but given that it includes the reasons for
23 conducting the search, but I -- I just don't know. I know
24 it's called the TECS, but I don't know whether that's public
25 or not.

1 QUESTION: Is it public that such a thing exists? Is
2 there --

3 MS. BLATT: I've just made it public.

4 (Laughter.)

5 QUESTION: But -- but -- I mean besides your word for
6 it. I trust you implicitly, but I'd like to be able to cite
7 something other than you.

8 (Laughter.)

9 MS. BLATT: I -- I'd have to go --

10 QUESTION: Okay.

11 MS. BLATT: -- on the Internet or something like that,
12 Justice Scalia.

13 QUESTION: I don't want to cut you off if you had
14 something else to say.

15 MS. BLATT: No, that was --

16 QUESTION: I just want -- I do think it's correct
17 though, is it not, that what really we're asked to decide is
18 whether you have the power to make random searches? I know
19 that they're costly and unlikely, but I think it -- it's --
20 it's not unlikely in today's world that you might decide you
21 want to search every one-hundredth vehicle or ever twenty-
22 fifth vehicle to let the world know that even if they hire
23 Ronald Coleman they might get searched. That is correct,
24 isn't it?

25 MS. BLATT: That's correct, Justice Stevens, and it's

1 quite conceivable if the country ever went on a red alert
2 that the commissioner of customs might say, or if there was
3 some vague intelligence about smuggling in pick-up trucks,
4 they might want to do very extensive searches of pick-up
5 trucks. Now whether they'll actually ever come to that I
6 hope not, but yet, this -- the -- the border power -- the
7 power to conduct a border search is one without any
8 particularized suspicion.

9 Thank you, Mr. Chief Justice.

10 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Blatt. The
11 case is submitted.

12 (Whereupon, at 11:12 a.m., the case in the above-
13 entitled matter was submitted.)

14

15

16

17

18

19

20

21

22

23

24

25